82-1279

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ALEXANDER L. STEVAS,
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NO. A - 529

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM 1983

Herbert O. Jensen,

Petitioner,

v.

Winston Satran, Warden,
North Dakota State Penitentiary,
and
Edward J. Klecker, Director,
Department of Institutions,
State of North Dakota,

Respondents.

PETITION FOR APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

Herbert O. Jensen, pro se
Box 1497 NDSP
Bismarck, N.D. 58502

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court, District of North Dakota, Southwestern Division, make an error by not allowing an evidentiary hearing to fully establish the facts of all the issues?

2. Did the United States Court of Appeals for the Eighth Circuit make an error regarding the following issues that Jensen had raised:

a) That Jensen was not allowed to subpoena and cross-examine witnesses at an evidentiary hearing.

b) That the North Dakota State Prison violated its own rules and regulations by giving notice of the alleged violation three days after the five day limit authorized by the Inmate Handbook.

c) That Jensen was unable to get any paint except through the express permission of, and the direct action of, either a Cell House Lieutenant or Captain.

d) That the Penitentiary violated its own rules and regulations by not giving Jensen a list of charges and penalties at the prison disciplinary hearing as prescribed by the Inmate Handbook.

3. Did the United States Court of Appeals for the Eighth Circuit make an error by deciding that the only time an inmate's incarceration time is affected by the loss of good time is <u>after</u> he has been given a parole release date? (emphasis added)

4. Did the United States Court of Appeals for the Eighth Circuit make an error by deciding that the prison

disciplinary board was unbiased because a prison officer, who sat on the board, also participated in submitting Jensen's incident report?

5. Did the United States Court of Appeals for the Eighth Circuit make an error by deciding that the prison disciplinary board did not make a mistake by refusing to disclose posted prison rules concerning inmate maintenance of assigned cells?

6. Did the United States Court of Appeals for the Eighth Circuit make an error by deciding that the prison disciplinary board had not ignored Jensen's argument that he had not lived in the cell in question for eight days prior to the issuance of the incident report?

7. Did the United States Court of Appeals for the Eighth Circuit make an error by deciding that the entire prison disciplinary procedure was not constitutionally infirm?

TABLE OF CONTENTS

	PAGE
Jurisdiction.....	1
Statement of the Case.....	2
Conclusion.....	11
Certificate of Service.....	13
Amendment 5.....	1a
Amendment 14.....	3a
Inmate Handbook.....	4a
N.D. Supreme Court Order.....	7a
U.S. District Court Order.....	10a
U.S. Appellate Court Order.....	13A
U.S. District Court Order.....	31a
U.S. Appellate Court Order.....	37a
Notice of Appeal.....	48a

TABLE OF AUTHORITIES

PAGE

STATUTES:

Title 28 U.S.C.S. 1254..... 1

Title 28 U.S.C.S. 1291..... 1

Title 28 U.S.C.S. 1331..... 1

Title 28 U.S.C.S. 2254..... 1

CONSTITUTION:

Amendment 5..... 2

Amendment 14..... 2

CASES:

Wolff V. McDonnell,

94 S. Ct. 2963 (1974)..... 1

OTHER AUTHORITIES:

North Dakota State Penitentiary

Inmate Handbook..... 2

JURISDICTION

This action is an appeal from an order of the United States Court of Appeals for the Eighth Circuit dated September 20, 1982.

The statutory basis for federal jurisdiction is believed to be Title 28 U.S.C.S. 1291, 1331, and 2254.

The notice of appeal was filed in the United States Court of Appeals for the Eighth Circuit on October 2, 1982.

The statutory provision believed to confer jurisdiction on this court is Title 28 U.S.C.S. 1254.

The case believed to sustain jurisdiction is Wolff V. McDonnell, 94 S. Ct. 2963 (1974)

This case involves violations of

rights secured by the Fifth and Fourteenth Amendments of the United States Constitution. (see appendix, page 1a)

This case also involves violations of rights secured by the North Dakota State Penitentiary's Inmate Handbook dated December 1978, "Inmate's Rights in the Disciplinary Process." (see appendix, page 4a)

STATEMENT OF THE CASE.

On October 14, 1980, Herbert O. Jensen, an inmate at the North Dakota State Penitentiary, was given an incident report for allegedly violating Code No. 152, "Destroying, altering, or damaging State property." (painting of a shelf on cell wall)

On October 17, 1980, Jensen

appeared before the prison adjustment committee. He asked that Board member, Steve Boulter, be removed, because he had delivered the incident report to Jensen and would therefore be biased. The request was denied.

Jensen then requested assistance from private counsel and/or staff counsel, but he was refused.

He then requested to know whether the infraction was serious or minor, because serious offenses may be sent to a District Court for a criminal charge. No answer was given to him.

He argued that he had been moved from the cell in question eight days prior to the issuance of the incident report.

In spite of Jensen's defense, the

prison adjustment committee found him guilty of the charge and sentenced him to the loss of one month's good time (10 days) and costs for cleaning or replacing of the shelf.

Jensen appealed the decision to the warden and the Director of Institutions, but he was denied by both.

On Nov. 26, 1980, Jensen filed a petition for a writ of habeas corpus with the Burleigh County District Court, South Central Judicial District, Bismarck, North Dakota, to restore the lost good time, claiming constitutional violations of due process and equal protection.

Jensen argued that he received the incident report three days after the five day limit prescribed in the Inmate Handbook; and that the incident report

did not contain a list of penalties or a statement of rights as prescribed in the Inmate Handbook.

On December 1, 1980, the Burleigh County District Court denied Jensen's petition for a writ of habeas corpus without an opinion.

On December 5, 1980, Jensen petitioned the North Dakota Supreme Court for a Writ of Habeas Corpus claiming constitutional violations of due process and equal protection.

He argued that the prison didn't have the right to take money out of his account to pay for the alleged damages; that he had not lived in the cell in question for eight days prior to the issuance of the incident report; that he had been denied the right to have

representation by outside attorney or staff counselor at the disciplinary hearing as prescribed in the Inmate Handbook; that the incident report had been delivered three days after the five day limit prescribed in the Inmate Handbook; and that he hadn't been informed of his rihts at the disciplinary hearing.

On December 15, 1980, Luella Dunn, Clerk of the North Dakota Supreme Court, denied the petition by stating that Jensen had been afforded due process. (see appendix, page 7a)

On December 29, 1980, Jensen petitioned the United States District Court for the District of North Dakota, Southwestern Division, Bismarck, N.D., for a writ of habeas corpus, claiming the previous constitutional violations.

He argued all of the previous stated violations, and in addition, he claimed that there was no written notice of the disciplinary committee's findings that had been given to him; and that what meeger written records had been given to him were not sufficient to enable him to have a proper review on appeal to the courts; and that the prison did not follow its own rules and regulations during the entire disciplinary process as required by the Inmate Handbook.

On January 14, 1981, the United States District Court denied Jensen's petition stating that he was not entitled to any relief. (see appendix, page 10a)

On February 13, 1981, Jensen

appealed to the United States Court of Appeals for the Eighth Circuit citing all of the previous arguments, and he also stated that he should have had an evidentiary hearing in the United States District Court.

On June 23, 1981, the United States Court of Appeals for the Eighth Circuit determined that Jensen had not been afforded a written decision by the prison disciplinary board; and that there had been inadequate responses by the defendants to Jensen's other claims. The case was remanded to the United States District Court for an evidentiary hearing. (see appendix, page 13a)

On January 6, 1982, Jensen sent a brief responding to defendants motion to dismiss. He asked for an evidentiary

hearing where he could cross-examine witnesses to establish the complete facts of all the issues in the case.

On January 29, 1982, the United States District Court, after receiving motions and briefs from both parties, but without holding an evidentiary hearing, once again denied Jensen's claims by stating that no material facts remained at issue, and that an evidentiary hearing would add nothing to the resolution of the matter. (see appendix, page 31a)

On February 10, 1982, Jensen once again appealed to the United States Court of Appeals for the Eighth Circuit listing all of the previous arguments, and also rebutting the District Court's opinion about the loss of good time not

affecting a person's incarceration time until after he receives a parole date.

On September 20, 1982, the Court of Appeals for the Eighth Circuit, while casting doubts, reluctantly agreed with the District Court's opinion, and denied Jensen's claims. (see appendix, page 37a)

On October 2, 1982, Jensen sent a Notice of Appeal to the Supreme Court of the United States to the United States Court of Appeals for the Eighth Circuit. (see appendix, page 48a)

The questions sought to be reviewed are so substantial that they require plenary consideration.

Jensen's constitutional rights of due process and equal protection, pursuant to the Fifth and Fourteenth Amend-

ments to the United States Constitution, have been violated by the prison disciplinary board, and the questions raised, especially those concerning the good time credits in relationship to the length of incarceration time, present serious issues which have never been decided by the Supreme Court of the United States.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this appeal be granted in favor of Jensen.

Dated this 10th day of January 1983.

Herbert O. Jensen

Herbert O. Jensen
Box 1497 NDSP
Bismarck, N.D. 58502

Subscribed and sworn to before me on this 10th day of January 1983.

Daryl D. Fischer
Notary Public

My commission expires on:
10/1/85

CERTIFICATE OF SERVICE

I, Herbert O. Jensen, being first duly sworn, affirms that on the 10th day of January 1983, he served A Jurisdictional Statement with Appendix by placing a true and correct copy in an envelope addressed to: Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543; Edwin F. Zuern, Special Assistant Attorney General, State Capitol, Bismarck, N.D. 58502; Robert D. St. Vrain, Clerk of Court, U.S. Court of Appeals for the Eighth Circuit, 1114 Market Street, St. Louis, Mo. 63101, and depositing the same, with postage prepaid, in the United States Mails at the North Dakota State Penitentiary, Box 1497,

Bismarck, North Dakota 58502.

Herbert O. Jensen

Herbert O. Jensen
Box 1497 NDSP
Bismarck, N.D. 58502

Subscribed and sworn to before me on this 10th day of January 1983.

Daryl A. Fischer
Notary Public

My commission expires on:
10/1/83

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived

of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INMATE HANDBOOK

DECEMBER 1978

INMATE'S RIGHTS IN THE DISCIPLINARY PROCESS

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1. To receive a list of charges and penalties.
2. Prompt and full nature of the alleged violation(s) will be given to inmates not later than five (5) days after the offense(s) except that an inmate placed in detention shall be notified within 24 hours of detention. The notice will contain the charge, full rule violation, incident description, witness(es), evidence, hearing date, and statement of rights.

3. Disciplinary hearings shall be held as quickly as possible after inmate is charged and generally this time period will not exceed 72 hours.
4. An opportunity to appear in person before the Disciplinary Board and be heard.
5. The right to bring evidence and to request witness(es).
6. The right to request continuance of hearing for cause.
7. An impartial "hearing board" which will not include the reporting officer, a witness, investigating officer, or anyone who will review the proceedings for appeal.
8. The right to be represented by a correctional staff member.

Prisoners undergoing disciplinary proceedings do not have the right to be represented by lawyers or other inmates.

9. A determination by the Warden or Acting Warden of the need for detention prior to a disciplinary hearing will be made in all cases.

10. Written notice of Disciplinary Board findings, disposition, and reason for both.

IN THE SUPREME COURT)
)
STATE OF NORTH DAKOTA)

Herbert O. Jensen,	
Petitioner,	
v.	ORDER
Winston Satran, Warden,	File NO.
North Dakota State	Cr. 554-D
Penitentiary,	
Edward J. Klecker, Director,	
State Department of	
Institutions,	
Respondents.	

The Petitioner, Herbert O. Jensen, filed a request for a writ of Habeas Corpus with the Supreme Court on December 10, 1980.

The Petitioner was charged with

damaging state property (i.e., a shelf mounted on a cell wall) at the State Penitentiary, and the Penitentiary Adjustment Committee determined, on October 17, 1980, that the Petitioner committed the act charged. The Committee recommended that the Petitioner lose one month's good time and be required to pay for cleaning or replacement of the shelf. Petitioner asserts that he was denied certain rights by the Committee during the process of reaching its determination and recommendation.

It appears from the documents filed with the Petition in this Court, Petitioner has been afforded the due process to which he is entitled. The Petition

is therefore denied.

Dated at Bismarck, this 15th day of December, 1980.

(s) Luella Dunn

Luella Dunn
Clerk of the Supreme Court
State of North Dakota

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

Herbert O. Jensen, Plaintiff, vs. Winston Satran, Warden, North Dakota State Penitentiary; Edward J. Klecker, Director, Department of Institutions, Defendants.	)	A1-80-177

ORDER

Petitioner has filed another Petition for writ of habeas corpus in which he asserts an exhaustion of state

remedies. The claim for habeas corpus relief allegedly arises out of an unconstitutional deprivation of good time and an assessment levied upon Petitioner's prison account for damages to prison property.

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, this Court has examined the petition for writ of habeas corpus and related documents, all of which were filed on December 31, 1980, and having determined that it plainly appears from the face of the petition that the Petitioner is not entitled to the relief he seeks, it is

ORDERED that said petition for writ of habeas corpus and related procedural relief be, and the same hereby

are, in all things, denied. It is further

ORDERED that said petition for writ of habeas corpus be, and the same hereby, is, in all things, dismissed.

Bismarck, North Dakota, this 14 day of January, 1981.

(s) Bruce M. Van Sickle,

Bruce M. Van Sickle, Judge.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 81-1223

Herbert O. Jensen, Appellant, v. Winston Satran, Warden, North Dakota State Penitentiary; Edward Klecker, Director, Department of Institutions, Appellees	Appeal from the United States District Court for the District of North Dakota

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Submitted: June 17, 1981

Filed: June 23, 1981

Before HEANEY, ROSS AND ARNOLD, Circuit Judges.

PER CURIAM.

Herbert O. Jensen appeals the district court's[1] January 14, 1981, dismissal of his 28 U.S.C. §2254 petition. Jensen, an inmate at the North Dakota State Penitentiary, alleged in his section 2254 petition that: (1) he was disciplined by prison authorities - specifically, the prison's disciplinary board - in violation of the Fourteenth Amendment's Due Process Clause and in violation of the penitentiary's own rules and regulations; (2) he unsuccess-

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[1]The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota.

fully sought habeas corpus relief in a North Dakota district court and in the North Dakota Supreme Court.

The facts of the underlying prison disciplinary action involved in the appeal are not fully developed in the record. It is clear, however, that Jensen was charged with "(d)estroying, altering, or damaging North Dakota State property * * * . Inmate Handbook, North Dakota State Penitentiary and State Farm 21 (Prohibited Act No. 152)(Dec. 1978). Specifically, he was charged with an unauthorized painting of a bookshelf in his cell. The bookshelf's condition was discovered when Jensen was transferred to another cell. The state's brief indicates that only the inside and backside

portions of the bookshelf were painted.

The prison's disciplinary board found that Jensen painted the bookshelf and therefore violated Prohibited Act No. 152. As penalty for this infraction, the board revoked one month of Jensen's earned good time credit (ten days) and assessed costs against Jensen to recondition the bookshelf.[2] No written decision of the prison's disciplinary board appears in the record.

Jensen sought review of this disciplinary action first from Warden Satran and then from the North Dakota

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[2]Prison officials apparently took monies from Jensen's account for this purpose, but the record is silent as to the amount actually withdrawn.

Director of Institutions; both upheld the prison disciplinary board's action. Unfortunately, the record does not disclose how the Warden or the Director of Institutions handled Jensen's appeal. There is a brief, but sketchy, description of these administrative appeals in the state's brief.

Jensen next sought habeas corpus relief in the Burleigh County, North Dakota, District Court; his application for relief was summarily denied without an evidentiary hearing on December 1, 1980. Thereafter, the North Dakota Supreme Court denied habeas corpus relief in a one-page order signed by its Clerk of Court. After summarizing the prison disciplinary board's action, the

North Dakota Supreme Court's order stated, "It appears from the documents filed with the Petition in this Court, Petitioner (Jensen) has been afforded the due process to which he is entitled."

Similarly, the federal district court summarily dismissed Jensen's section 2254 petition without a hearing and before ordering the state defendants to file answers. In dismissing Jensen's petition, the district court relied upon Rule 4 of the Rules Governing 2254 cases in United States District Courts,[3]

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[3]Rule 4 of the Rules Governing 2254 Cases in the United States District Courts, entitled "Preliminary Consideration by Judge," states:

Both Jensen and the state agree that the sole issue for determination is whether the district court erred in dismissing Jensen's section 2254 petition after reviewing only the petition and attached documents without requesting

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> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.
>
> (West Federal Rules, 1980) (emphasis added).

a response or answer and without holding an evidentiary hearing. For the reasons discussed below, we hold that the district court erred in dismissing Jensen's petition.

When an inmate's constitutionally protected interests are at stake, the Fourteenth Amendment's Due Process Clause requires the state prison's disciplinary proceedings to afford an inmate the following protections: (1) at least twenty-four hours advance written notice of the claimed violation; (2) a written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action taken; and (3) the right to call witnesses and present documentary evidence in

defense when to do so would not be unduly hazardous to institutional safety or correctional goals. Wolff v. McDonnell, 418 U.S. 539, 558-572 (1974). See also Cummings v. Dunn, 630 F. 2d 649, 650 n.4 (8th Cir. 1980) (per curiam).

We reject the state's contention that Jensen's claims do not involve the deprivation of substantial rights protected by the section 2254 habeas corpus mechanism. See Preiser v. Rodriquez, 411 U.S. 475, 487-489 (1973) (state prisoners' allegations that corrections officials acted unconstitutionally in depriving them of good time credits deemed "just as close to the core of habeas corpus as an attack on the prisoner's conviction".) See also Wolff

v. McDonnell, supra, 418 U.S. at 555-558 (when a state created a statutory right to good time credit, prisoner's interest is embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause).

Jensen alleges that the disciplinary action was not conducted according to prison regulations. Specifically, Jensen alleges that the prison disciplinary board: (1) refused to disclose whether the offense charged was a "serious or minor infraction;" (2) refused to allow representation by outside counsel; (3) was biased because

a prison officer who sat on the disciplinary board also participated in submitting Jensen's incident report; (4) refused to disclose posted prison rules concerning inmate maintenance of assigned cells; and (5) ignored Jensen's argument that "he had not lived in the cell in question for eight days prior to leaving the area."

The records and briefs supply a response to two of Jensen's five contentions. First, neither the Inmate Handbook nor Wolff v. McDonnell, supra, require the infraction notice to specify whether the offense charged was "serious or minor." Jensen does not argue that the charge was not clearly made known to him and it appears that such infor-

mation was adequately furnished to him. Second, neither the Inmate Handbook nor Wolff v. McDonnell, supra, require inmate representation by outside counsel.

The record does not supply an adequate response to Jensen's third claim. With respect to this allegation, the state contends that the disciplinary board that reviewed Jensen's case did not include, as a member, one of the prison offials who submitted Jensen's incident report. Since the issue remains in dispute, the district court is directed to specifically address the issue on remand.

The record supplies absolutely no response to Jensen's fourth and fifth

claims. Since the prison disciplinary board apparently did not prepare a written decision, it is uncertain whether these contentions were considered. As noted, state prison disciplinary fact-finders are required to render a written statement setting forth the evidence relied on and the reasons for the disciplinary action taken. Wolff v. McDonnell, supra, 418 U.S. at 563-565. In Wolff, the Supreme Court emphasized the importance and necessity of a written record of prison disciplinary proceedings. Id at 565. The Inmate Handbook also requires written notice of the disciplinary board findings, its disposition and its reasons for both.

A federal district court must grant

an evidentiary hearing in a section 2254 action if:

> (1) the merits of the factual dispute were not resolved in a state hearing, (2) the state factual determination is not supported by the record, (3) the state fact finding procedure failed to provide full and fair hearings, (4) there is a substantial allegation of newly discovered evidence, (5) material facts were not developed at the state court hearing, or (6) it appears the state fact trier did not afford the petitioner a full and fair hearing.

Pruitt v. Housewright, 624 F. 2d 851, 852 (8th Cir. 1980) (citing Townsend v. Sain, 372 U.S. 293, 313 (1963).

This court has required a federal district court to grant an evidentiary hearing in a section 2254 action "if relevant factsare in dispute and a fair evidentiary hearing was not granted in state court." Id. (quoting Parton v. Wyrick,

614 F. 2d 154, 158 (8th Cir.), cert. denied, 101 S. Ct. 131 (1980)). Before a hearing is required, however, it must appear that the petitioner's allegations, if proven, would establish the right to his release.[4] See also Walker v. Solem, (8th Cir. May 19, 1981) slip. op. at 4 (standards for evidentiary hearings in section 2254 cases discussed); Lindner v. Wyrick, No. 80-1468 (8th Cir. Mar. 24, 1981) slip op. at 9-10 (dismissal with-

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[4]We note that even though restoration of Jensen's good time credit would not result in his immediate release but would only shorten the length of his confinement, habeas corpus under section 2254 is nevertheless the appropriate remedy. Preiser v. Rodriquez, 411 U.S. 475, 487-488 (1973)

out an evidentiary hearing proper when dispute can be resolved on the basis of the record).

In this case, Jensen did not receive an evidentiary hearing in the North Dakota state court system or in the federal district court. This fact alone would warrant a remand to the district court for an evidentiary hearing.[5] See Pruitt v. Housewright, supra. However, the apparent lack of a written

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[5]For the reasons stated, we cannot agree with the state's contention that an evidentiary hearing was not necessary in the district court under the circumstances of this case. The state's reliance on Willis v. Ciccone, 506 F. 2d 1011 (8th Cir. 1974); Proffitt v. Ciccone, 506 F. 2d 1020 (8th Cir. 1974); and Frazier v. Ciccone, 506 F. 2d 1022 (8th Cir. 1974), is misplaced.

decision by the prison disciplinary board renders analysis of the merits of Jensen's claims virtually impossible and, in our view, independently requires a reversal and remand under Wolff v. McDonnell, supra, principles. As noted earlier, the Inmate Handbook also requires the disciplinary board to supply a written decision. Jensen's allegations of impropriety in his disciplinary proceedings are not totally insubstantial, at least when viewed from the record's present state. We emphasize that, on remand, the evidentiary hearing should adduce the relevant facts we find lacking at this time. The state will be given an opportunity to establish that the basic requirements of Wolff v.

McDonnell, supra, were met in the prison disciplinary proceeding against Jensen.

Reversed and remanded for proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals,

Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

Herbert O. Jensen, Petitioner, V. Winston Satran, Warden, North Dakota State Penitentiary; Edward J. Klecker, Director, Department of Institutions.	)	A1-80-177

O R D E R

By mandate docketed herein on July 28, 1981, and pursuant to its

opinion issued June 23, 1981, the United States Court of Appeals for the Eighth Circuit reversed and remanded this case for proceedings consistent with said opinion. That opinion contemplates and evidentiary hearing for the purpose of adducing the " . . . relevant facts we find lacking at this time."

Petitioner filed this petition for writ of habeas corpus on December 31, 1980. After examination of said petition and related documents, this Court on January 14, 1981, summarily dismissed said petition, under the provisions of Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, because " . . . it plainly appears from the face of the petition that the Petitioner is not entitled to the relief he seeks."

Petitioner was duly notified of this Court's action, and appeal to the United States Court of Appeals for the Eighth Circuit followed.

The matter is now before the Court on Respondents' motion to dismiss. The motion is supported by lengthy brief, affidavits, and other attachments which purport to supply the"relevant facts" found to be lacking by the appellate Court. Petitioner has responded to this motion to dismiss by filing his own motion to quash the motion to dismiss; his motion is also supported by brief.

Although an evidentiary hearing is contemplated by the opinion of the Court of Appeals, that Court recognizes that, unless it appears from " . . . petitioner's

allegations, if proven, . . . " that his right to release is established, no evidentiary hearing is necessary. See: Jensen v. Satran, et al., No. 81-1223 (8th Cir. June 23, 1981) slip op. at 6. Notwithstanding the comment of the Court of Appeals in footnote 4, page 6 of the above cited opinion - that " . . . restoration of Jensen's good time credit would not result in his immediate release but would only shorten the length of his confinement, . . . (emphasis added) -- victory by Jensen in this matter would have no effect whatsoever upon his period of confinement, because no parole date has been established in his case. See: Appendix XI, attached to the movants' brief, which is the affidavit of William

C. Kelsch, Chairman of the North Dakota Parole Board.

Now Therefore, the Court having determined that no evidentiary hearing is required in the interest of Justice and the proper disposition of this matter, and having considered the pending motion to dismiss, as buttressed by the brief, affidavits, and all other attachments appended thereto, together with the Petitioner's return to said motion, and being well and sufficiently advised in all the premises, it is

ORDERED that said motion to dismiss be, and the same hereby is, in all things, granted, for the reason that no material facts remain at issue and the movant is entitled to judgement as a matter of law. The documentation here on file, including

the affidavits and the records of the institutional administrative appeal, conclusively shows that the Petitioner is entitled to no relief and that an evidentiary hearing would add nothing to a just resolution of this matter.

The Clerk is directed to forthwith enter judgement of dismissal in accordance herewith.

Bismarck, North Dakota, this 29 day of January, 1982.

(s) Bruce M. Van Sickle

Bruce M. Van Sickle, Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 82-1213

Herbert O. Jensen, Appellant,	)	
v.	)	Appeal from the United States District Court for the District of North Dakota
Winston Satran, Warden, North Dakota State Penitentiary; Edward J. Klecker, Director, Department of Institutions, Appellees.	)	

Submitted: September 13, 1982

Filed: September 20, 1982

Before BRIGHT, Circuit Judge, STEPHENSON and HENLEY, Senior Circuit Judges.

HENLEY, Senior Circuit Judge.

Herbert O. Jensen, an inmate at the North Dakota State Penitentiary, appeals the district court's[1] January 29, 1982 summary dismissal of his petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254. The dispute centers on prison procedings resulting in loss of "good time" and assessment of costs for reconditioning a bookshelf which Jensen seems to have painted white in violation of prison rules.

This case comes before us for the second time. In Jensen v. Satran, 651 F. 2d 605 (8th Cir. 1981), we reversed the district court's summary dismissal of Jensen's 2254 petition without having requested a response and without having held an evidentiary hearing, and remanded

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[1]The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota.

the case for further proceedings. On the record then available we contemplated the necessity of an evidentiary hearing; however, we pointed out that dismissal of a habeas corpus petition without a hearing may be appropriate where: (1) the allegations, even if true, fail to establish the petitioner's right to release,[2] Parton v.

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[2]We noted that even though restoration of Jensen's good time credits would not result in his immediate release but would only shorten the length of his confinement, habeas corpus under 2254 was nevertheless the appropriate remedy. Jensen v. Satran, 651 F. 2d at 608 n.4 (citation omitted)

Wyrick, 614 F. 2d 154, 158 (8th Cir.) cert. denied, 449 U.S. 846 (1980); and (2) the facts are not in dispute or where the dispute can be resolved on the basis of the record. Lindner v. Wyrick, 644 F. 2d 724, 729 (8th Cir.) cert. denied, ____U.S.____, 102 S. Ct. 345 (1981); Hampton v. Wyrick, 588 F. 2d 632, 633 (8th Cir. 1978) (per curiam) cert. denied, 440 U.S. 924 (1979).

Following the court's remand appellees (respondents) filed a motion to dismiss supported by brief, affidavits and other attachments. Jensen, who at the time was represented by counsel, responded to the motion and supporting documents and filed a supporting brief.

After consideration of the respective motions and supporting materials, the district court granted the motion to dismiss, holding that no evidentiary hearing was required in that "victory by Jensen in this matter would have no effect upon his period of confinement, because no parole date has been established in his case." The affidavit of William C. Kelsch, chairman of the North Dakota Parole Board, undertook to establish, inter alia, that the only time an inmate's incarceration time is affected by the loss of good time is after he has been given a parole release date. In the event an inmate who has a release date loses good time, Mr. Kelsch stated that the release date will automatically be advanced the number of days

of good time lost. Jensen appeared before the parole board in September of 1981, but was denied any consideration because the board determined that he had served an insufficient amount of time on his thirty year sentence.

The district court went on to conclude that no material facts were at issue, that the file and the records conclusevely showed as a matter of law that the petitioner was entitled to no relief. Jensen subsequently brought this timely appeal.

The factual background of this contoversy has been fully outlined in this court's previous opinion and need not be repeated here. Once again the

crucial question before this court is whether the district court's dismissal of Jensen's 2254 petition without a hearing was proper.

Although we have serious misgiving about the district court's conclusion that the restoration of Jensen's good time credit would not shorten the length of incarceration, we nevertheless affirm the dismissal because we are persuaded that respondents have conclusively demonstrated that no material issue of fact remains and that the prison disciplinary procedures under attack were not constitutionally infirm.

On Jensen's previous appeal, this court found inadequate response to

Jensen's claims that the prison board "(3) was biased because a prison officer who sat on the disciplinary board also participated in submitting Jensen's incident report; (4) refused to disclose posted prison rules concerning inmate maintenance of assigned cells; and (5) ignored Jensen's argument that 'he had not lived in the cell in question for eight days prior to leaving the area.'" Jensen v. Batran, 651 F. 2d at 607. We observed also that the record contained no written decision of the board as required by Wolff v. McDonnell, 418 U.S. 539 (1974).

On remand the record was made to reflect that the prison disciplinary board did prepare a written decision as

required by Wolff v. McDonnell, supra. That report, while sparse in content, is a part of the incident report and the entire document is used as a single tool to facilitate prison disciplinary procedings. The state concedes the form needs improvement and points out that revisions are in process. Nonetheless the form was sufficient to inform Jensen of the evidence relied on by the factfinders in reaching their decision to take disciplinary action.

In regard to Jensen's claim that the prison disciplinary board was biased because a prison officer who sat on the disciplinary board also participated in submitting Jensen's incident report, the state contends and the record reflects

that the officer in question (officer Boulter) had nothing to do with the investigation, or with the writing of the incident report. He merely delivered a copy of the report to Jensen. Such a minimal involvement clearly was not such as to affect Boulter's objectivity as a member of the committee that heard the complaint.

As to posting of the rules, there is a rule against destroying, altering, or damaging state property. There is no claim that Jensen was unaware of the rule and there is no showing that posting or lack of posting of the rule was prejudicial to Jensen in any way.

Finally, the record now reflects that the board did not ignore Jensen's

defense that he had not lived in the cell in recent days. The cell had been "deadlocked," or unoccupied, since Jensen moved out. Thus, the board considered Jensen's defense but found it incredible.

From what has been said, it follows that the judgement of the district court should be, and it is, affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX

UNITED STATES COURT OF APPEALS #8

FOR THE EIGHTH CIRCUIT

FILED

DISTRICT 81-1223

Oct. 7, 1982

CIRCUIT 82-1213

ROBERT D. St. VRAIN
CLERK

Herbert O. Jensen,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO.
	)	
Winston Satran, Warden,	)	
	)	
North Dakota State	)	
	)	
Penitentiary, et al,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

I. Notice is hereby given that Herbert O. Jensen, the above-named plaintiff, hereby appeals to the Supreme Court of the United States from the final order of the United States Court of Appeals, Eighth Circuit, which was entered on September 20, 1982. This Appeal is taken pursuant to Title 28 USCS 1254.

II. The Clerk will please certify and prepare a transcript of the entire record in this case for transmission to the Clerk of the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Did the District Court err by not allowing an evidentiary hearing to

fully establish tha facts of all the issues?

2. Did the Circuit Court err by not considering, and by not ruling on, the following issues that plaintiff Jensen had raised:

a. That Jensen was not allowed to subpoena and cross-examine witnesses at an evidentiary hearing?

b. That the penitentiary violated its own rules and regulations by giving notice of the alleged violation three days after the five day limit authorized in the inmate handbook?

c. That Jensen was unable to get any paint except through the express permission, and the direct action, of either a cell-house Captain or Lieutenant.

d. That the penitentiary violated its own rules and regulations by not giving Jensen a list of charges and penalties at the disciplinary hearing as prescribed by the inmate handbook.

3. Did the Circuit Court err by deciding that the only time an inmate's incarceration time is affected by the loss of good time is after he has been given a parole release date?

4. Did the Circuit Court err by deciding that the prison disciplinary board was unbiased because a prison officer who sat on the disciplinary board also participated in submitting Jensen's incident report?

5. Did the Circuit Court err by deciding that the disciplinary board

did not make a mistake by refusuing to disclose posted prison rules concerning inmate maintenance of assigned cells?

6. Did the Circuit Court err by deciding that the prison disciplinary board had not ignored Jensen's argument that he had not lived in the cell in question for eight days prior to leaving the area?

7. Did the Circuit Court err by deciding that the entire disciplinary procedure was not constitutionally infirm?

Dated this 2nd Day of October 1982.

Herbert O. Jensen
Box 1497 NDSP
Bismarck, N.D. 58502

Subscribed and sworn to before me on this 2nd day of October 1982.

My commission expires on:

Daryl Fischer 10/1/85

Notary Public

END OF DOCKET